IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.163 OF 2007

Union of India .. Petitioner.

Versus

M/s.Arora Associates .. Respondents.

Mr.Suresh Kumar for petitioner.

Mr.S.U.Kamdar for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 3rd September, 2007.

P.C.:

1. Admit. Respondents waive service. By consent, returnable forthwith.

2. Heard Mr.Kumar appearing for the petitioner and Mr.Kamdar, learned Counsel appearing for the respondents.

3. The challenge is to the Arbitration Award dated 14th February, 2007 of the Arbitral Tribunal.

4. If the claims, that are awarded are perused,

Mr.Kumar submits that only three claims have been awarded. He has a grievance with regard thereto. The payment of second running account bill, refund of security deposit and payment of interest are the three claims, which have been awarded and the Arbitral Tribunal has directed the Union of India to pay to the claimant a sum of Rs.15,61,718/- within 60 days from the date of publication of this Award, failing which simple interest is directed to be paid from the 61st day from the date of Award upto the date of payment.

5. The submission of Mr.Kumar, insofar as the payment under the second running bill is concerned, is that the same could not have been awarded. He submits that this is a case where the majority has awarded the claims but the minority proceeded to reject the same. He further submits that the first running bill, recorded on 26th April, 1999, was paid for Rs.6,17,084/-. The first running bill was paid for lumpsum quantity against two items. He also submits that the second running bill was lodged on 25th July, 1999, but the same was cancelled. He then submits that in the second running bill also, lumpsum amount has been claimed with regard to the quantities recorded therein. However, no supporting calculations or other details have been forwarded. In such circumstances, and

when the bill was submitted after the termination of the Contract, the amounts therein were not payable. He submits that there are overwritings in the recorded quantities entered into second running bill. In such circumstances, and when no over writing is permitted, the bill could not have been directed to be honoured. He has invited my attention to the reasonings of the Arbitrator, who has differed from the majority. In this behalf, he has invited my attention to the terms and conditions of the Contract. He submits that once the measurements and certificates are contemplated under the terms and conditions, then, unless and until the payment is certified, there is no question of honouring the bills raised by the Contractor. He has also invited my attention to the majority Award and submitted that the same does not assign any reasons. Further, they have failed to discuss the final measurements recorded by the party. In these circumstances, this claim could not have been awarded.

6. Insofar as the refund of the security deposit is concerned, he submits that the same is awarded in contradiction to the terms and conditions and more particularly, the clause with regard to the payment contemplated when the contract was entered into. He has

invited my attention to Clauses 61 and 62 so also Clause 64 of the terms and conditions in this behalf.

7. Finally, with regard to interest, Mr.Kumar submits that no interest could have been awarded. He further submits that there is a specific prohibition in Clause 64(5) where it is clearly stipulated that if the arbitral Award is for payment of money, then, no interest shall be awarded on the whole or any part of the money till the date on which the Award is made. He also submits that this prohibition has been clearly ignored and, therefore, the Award is clearly vitiated. He submits that the Award would be liable for interference in terms of Section 34(2)(iv) so also Section 34(2)(b)(i)(ii) of the Arbitration and Conciliation Act, 1996 (for short "the said Act").

8. In support of his submissions, Mr.Kumar has relied upon the following decisions of the Supreme Court and Bombay High Court.

1) AIR 2002 S.C. 1272 (General Manager, Northern Railways and Anr. v/s. Sarvesh Chopra)

2) Arbitration Petition No.357 of 2005 (Union

of India v/s.M/s.B.D.Shah & Co., Order dated 13th December, 2005).

9. On the other hand, Mr.Kamdar appearing for the respondents, urges that all grounds, which are raised in this petition, are based upon the reasonings given in the Minority Award of the Arbitral Tribunal. He submits that this cannot be the basis for challenging the Award. He further submits that it is fallacious to hold that the majority Award does not assign any reasons for awarding the claim. On the other hand, qua each of the claim awarded, the majority Award has assigned reasons. Further, with regard to some of the claims that have been awarded, the minority Award does not differ with the majority opinion. That apart, all the Arbitrators have concurred in rejecting most of the claims and those that have been awarded are after considering the entire material placed before the Arbitrators. This is not a Court of Appeal so as to appreciate the material once again. In such circumstances, there is no substance in the contention that the Award is liable to be set aside insofar as it awards the claim under the second running account bill. Similarly, with regard to refund of security deposit, the Arbitrators have assigned reasons for refunding the same inasmuch as the Union of India

cannot withhold the same, contrary to the terms and conditions. If it has withheld the amounts, which are ultimately to be paid, then, an Award can be made in terms of the contract, directing refund of security deposit as well.

10. Finally, Mr.Kamdar submits that any stipulation in the contract, which runs contrary to Section 31(7) of the said Act would be bad and not binding upon parties. In other words, the Award insofar as it directs payment of interest is concerned, is not in conflict with Section 31(7) (a) and (b) of the said Act. Further, it cannot be said to be beyond the terms of the contract or contrary thereto. In such circumstances, the Award is not liable to be interfered even on this ground.

11. Alternatively, Mr.Kamdar submits that the Award insofar as it directs payment of interest is clearly severable and that part of the Award can be separated from the earlier. Without disturbing the same, this Court, vide powers conferred under the said Act, so also in its inherent jurisdiction, can modify the Award to that extent.

12. I have perused the petition and the annexures

thereto, including the terms and conditions of the contract insofar as they are material for the purposes of appreciating the rival contentions.

13. The general conditions of contract for use in connection with engineering works contain general obligations and also specific obligations / responsibilities.

14. The Arbitrators entered upon Reference and considered the claims and counter claims of the parties before them. It is undisputed that the work is awarded to the respondents for providing Drainage Arrangement between 174 kms and 186 kms in Pune Division, vide Contract / Agreement dated 19th March, 1999 for the total cost of Rs.29,10,140.76. The Letter of Authority was issued and the contract period was stipulated as five months. The contract work was bifurcated into four sites. The claimants sought opening of two or three other sites so that the work can be completed before on set of monsoon. Thereafter, further sites were to be opened. The Union of India/Railways granted extension of time but with penalty. However, the Contractor did not agree with the penalty and that is how the disputes arose and the claims were referred for adjudication.

15. Claim Nos.1 to 4 have been rejected.

16. Insofar as Claim No.5 i.e. payment of second running account bill is concerned, the majority Award considered the admitted facts and thereafter considered the material placed before it. It has assigned cogent reasons by taking into consideration the details in the site register. It has also noted the facts that certain payments have already been made. It has also noted the admitted fact that the bill and majority measurement book was jointly signed by the claimants as a token of acceptance. Overwriting has also been a matter, which has been considered by them and that is how the contention of the Union of India / Railways that the second running account bill has been cancelled as it is incorrect, has been rejected.

17. The majority Award takes into consideration of further admitted fact that if the said bill was cancelled as contended by the petitioner, then, there would have been some written material in that behalf. However, no intimation of this cancellation has been placed on record by the petitioner. The manipulation or overwriting, which was complained of, has also been taken into consideration

and it is observed that no material is placed before them in that behalf. In such circumstances, and when both sides do not lead any evidence but place reliance on documents, the contents of which are also undisputed, then, the figures taken into account and relied upon to award the subject claim cannot be said to be perverse or contrary to the terms and conditions of the contract or vitiated otherwise so as to call for interference in limited jurisdiction of this Court that is conferred under Section 34 of the said Act. I am in agreement with the submission that this is not a Court of Appeal which can undertake further appreciation and appraisal of the materials.

18. Thus, the first contention of Mr.Suresh Kumar must fail. Insofar as the second contention that the security is not liable to be refunded is concerned, the Arbitral Tribunal has taken into consideration the correspondence so also the oral arguments. It has noted that enough working sites were not made available by the Railways which caused delay in executing the work. It has further noted that there was a delay in honouring the second running account bill. There is no approval of various statements and thus, these lapses on the part of the Railways were, in the opinion of the Arbitral Tribunal,

enough for holding that there are breaches committed by the Railways and, therefore, forfeiture of the security deposit is invalid. Even the minority opinion agrees that the security deposit is liable to be refunded. However, there are some different reasons assigned for that conclusion. Once again, it is well settled that sufficiency or adequacy of reasons is not a matter for this Court to consider and interfere with the Award on that count. This Court may arrive at the same conclusion for some additional or different reasons but that is not a ground to interfere with the Award. In such circumstances, the second contention of Mr.Suresh Kumar must also fail.

19. With regard to the claim for payment of interest, the clause, which has been pressed into service reads thus :-

> "64(5) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made."

20. The Award directs payment of interest on the ground that pendente lite interest deserves to be granted

because the amounts, which are payable to the Contractor, have not been paid. Although, while considering this claim, the Tribunal was aware of the stipulations in the Contract, both majority and minority grant the claim for interest. It is the contention of Mr.Kamdar that the interest has not been awarded at the rate claimed by the contractor, but the same has been scaled down. It is a simple interest which has been awarded for the unpaid amount from the date of invocation of the arbitration till the decision of the award. He submits that this does not fall within the stipulation / prohibition under the Contract.

21. The clause is widely worded. It would not be fair and proper for the Tribunal to ignore the mandate of the clause inasmuch as there is a prohibition not to award interest. It is not payable on whole or any part of the money for any period till the date on which the award is made. When parties agree to an stipulation and prohibition that no interest is liable to be payable for any period till the date on which the award is made, then, it is difficult to agree with Mr.Kamdar’s submission that Section 31(7)(a) is permitting the Tribunal to award interest. The wording of the section is also very clear inasmuch as it opens with the words "unless otherwise

agreed by the parties". Here, a clear Agreement between parties has been placed before Arbitral Tribunal which does not permit grant of interest for any period till the date on which the Award is made. In such circumstances, grant of pendente lite interest is contrary to the stipulations and express terms of the contract. The award is, therefore, vitiated on that count and is, therefore, liable to be interfered with.

22. However, I am in agreement with Mr.Kamdar that the Award is separable and severable to the extent it directs payment of interest on the sums awarded. This part of the award and the claim being considered separately and even Mr.Suresh Kumar finding it difficult to meet the contention that the claim is not severable, I am of the view that this part of the award can be interfered with and considered separately. The entire award may not be set aside. The award can be modified and the claim for interest as awarded upto the date of the award, therefore, must be set aside. It is accordingly, set aside. The Union of India shall not be liable to pay any interest, pendente lite, i.e. till the date of the Arbitral Award.

23. However, the petitioner is liable to pay to the respondents interest as simple interest @10% as directed

in the Award from the date of Award till payment. That is a power which can be exercised by this Court under the said Act. Hence, Award of future interest is maintained.

24. With regard to the submission of Mr.Suresh Kumar that the costs of arbitration could not have been awarded as they are to be shared equally by the parties, I am of the view that the amount of costs towards arbitration have been awarded in the sum of Rs.40,000/-. In such circumstances, and when I have modified the award to the considerable extent, I am of the view that there is no violation of the terms and conditions by the Tribunal. In the facts of this case, reliance upon the decision of the Supreme Court reported in **(1999) 7 SCC 339 (State of J&K & Anr. v/s.Dev Dutt Pandit) and that of the Calcutta High Court reported in AIR 2005 CALCUTTA 305 (Steel Authority of India Ltd. v/s. Shyam Sundar Choudhary)** by Mr.Kumar is misplaced because in the facts of those cases, the Court found the award to be vitiated on quantum of costs. There, the claims of the contractor were highly inflated and were thus rejected. Here, atleast in some claims, the amount claimed has been found worthy of acceptance. In such circumstances, in the peculiar facts of this case, the award is not liable to be interfered with on the issue of payment of costs.

25. In the light of the above, the challenge to the award insofar as it directs payment of the second running bill, refund of security deposit and costs fail. However, the challenge to the extent it directs payment of interest till the date of Award succeeds and the Award is modified as above.

26. The arbitration petition stands partly allowed. The Award stands modified as above. No order as to costs.

(S.C.Dharmadhikari, J.)